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8
 9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

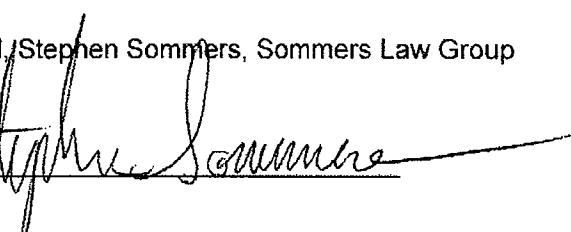
11 PAUL MONTWILLO, an individual) Case No. C 07 3947
12 Plaintiff,) STIPULATION AND ORDER FOR
13 vs.) LEAVE OF COURT PERMITTING
14 WILLIAM TULL; DANIEL GIBBY;) FILING OF COUNTER-CLAIM OF
15 GIBBY NOVELTIES, LLC, et al.) WILLIAM TULL
16 Defendants.)
) Complaint Filed: August 1, 2007

17
 18 The above parties to this litigation, Plaintiff Paul Montwillo and Defendants William Tull,
 19 Daniel Gibby and Gibby Novelties, by and through their respective attorneys of record, do
 20 hereby stipulate and agree that Defendant William Tull will be given leave of Court to file the
 21 attached Counter - Claim in the above-entitled matter. Upon filing and service, Plaintiff shall
 22 have 10 days in which to respond.
 23

24 The above is so stipulated to:

25 For Plaintiff Paul Montwillo, Counsel of Record, Stephen Sommers, Sommers Law Group

26
 27 Date: 1/4/2008

By 

28
 MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI

STIPULATION AND ORDER FOR LEAVE OF COURT RE: COUNTER-CLAIM OF WILLIAM TULL

1 For Defendants, Counsel of Record: David Y. Wong, Attorney at Law
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3 Date: 1/10/08

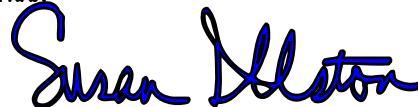
4 By _____



5 It is hereby ORDERED pursuant to F.R.C.P. and the Local Rules of this Court:

6 The foregoing request is granted by the Court. Defendant Tull shall be given leave to file
7 the attached Counter-Claim and a responsive pleading shall be due from Plaintiff Montwillo
8 within 10 days of filing and service.

9 Dated:



10 Hon. Susan Illston

11 United States District Judge

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Attorneys for Defendants William Tull, Daniel Gibby and
Gibby Novelties, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual) Case No. C 07 3947
vs.)
Plaintiff,) COUNTER-CLAIM OF
vs.) WILLIAM TULL (FRCP RULE 13)
WILLIAM TULL; DANIEL GIBBY;)
GIBBY NOVELTIES, LLC dba ARSENIC &)
APPLE PIE, a California Limited Liability)
Corporation and DOES 1 through 20,)
inclusive,)
Defendants.)
WILLIAM TULL,) Complaint Filed: August 1, 2007
vs.)
Counter-Claimant,)
vs.)
PAUL MONTWILLO, an individual, and)
DOES 21 through 30, inclusive)
Counter-Defendants)

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2 DEFENDANT and COUNTER-CLAIMANT WILLIAM TULL, pursuant to the authority provided
3 by Federal Rules of Civil Procedure Rule 13, hereby counter-claims against PLAINTIFF and
4 Counter-Defendant PAUL MONTWILLO, as follows

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6 JURISDICTION AND VENUE

7 1. This Court is the proper Court for this action, as it arises out of the original and exclusive
8 Federal jurisdiction over matters dealing with copyright law, pursuant to 17 U.S.C. § 301.
9 2. This Court has personal jurisdiction over the Counter-Defendant in that said Counter-
10 Defendant resides in and conducted business in this judicial district, the acts of conversion of
11 copyright protected assets occurred in this judicial district, and a substantial part of the events
12 which give rise to the Counter-Claim occurred in this judicial district.

13
14 PARTIES

15 3. Counter-Claimant William Tull (hereinafter "Tull") resides in Marin County and is a citizen
16 of the United States and of the State of California.
17 4. Counter-Defendant Paul Montwillo (hereinafter "Montwillo") resides in San Francisco and
18 is a citizen of the United States and of the State of California.

19
20 GENERAL ALLEGATIONS

21 5. COUNTERDEFENDANT Montwillo and COUNTERCLAIMANT Tull were the founders
22 and co-managing members of a California limited liability company, Arsenic & Apple Pie, LLC.,
23 which was formed in April of 1999 for the purpose of designing, manufacturing and distributing
24 satirical dolls known as "trailer trash dolls." Montwillo was generally responsible for the creative
25 aspects of the dolls and Defendant Tull was responsible for managing and underwriting the
26 business venture. Each held a 50% interest in the Company. The business' capital structure
27 was a classic "sweat equity" arrangement – Tull provided all of the financing for the venture, and
28

1 Montwillo contributed his designs for the dolls, and worked in the business in a designer and
2 creative director capacity.

3 6. After several years of disappointing sales and the absence of any net profits, Arsenic &
4 Apple Pie was floundering and had yet to repay any of the first priority loans made to it by Tull.
5 In July of 2004, the Company was forced to windup and dissolve following the disclosure of
6 Montwillo's earlier petition in bankruptcy. The decision to dissolve the Company was
7 involuntary as Article IX of the Operating Agreement specifically provides that the Company
8 shall automatically windup operations and dissolve upon the occurrence of certain triggering
9 events. Among the triggering events listed in the Operating Agreement, is the filing of a petition
10 in bankruptcy by a managing member.

12 7. At the time of windup and dissolution, the Company's balance sheet showed that its
13 primary asset was in the form of unsold product inventory valued at \$31,995.57, however, the
14 Company owed \$73,216.60, mostly in outstanding loans to Tull. As stipulated by California law
15 and the Operating Agreement, the Company liquidated its assets and offered them for sale to
16 the highest bidder as part of a plan to pay the Company's debts in accordance with the
17 Operating Agreement. Any remaining assets were to be distributed equally to the two
18 members.

20 8. No bids were received for the inventory or any other assets of the Company. At the
21 same time, the balance of the Company's cash was insufficient to pay the Company's third party
22 debts and liabilities. \$11,297.96 of the remaining inventory was thus earmarked for liquidation
23 and payment of Arsenic's outstanding third party debts and, since the Company lacked any
24 means of actually liquidating the inventory at book value, Tull accepted personal responsibility
25 for the payment of these debts in exchange for the correlating amount of inventory at its book
26 value.

9. The Company then determined that since Tull was still owed \$73,216 in loans to the Company, that the only reasonable means of winding up would be for Tull to accept in trade the remaining inventory of \$20,697 and whatever value could be attributed to the copyrights and any other intellectual property rights to the doll designs at \$52,518.99. Montwillo was given the option of personally bidding or locating a prospective bidder for such assets of the Company, but failed to do so. Consequently, on July 17, 2004, Tull was given the remaining product inventory and the intellectual property rights to the aforementioned doll designs, in full satisfaction of his loans to the Company.

10. It undisputed by Montwillo that he filed for bankruptcy in April of 2002. It is also undisputed that when Montwillo filed bankruptcy in 2002, he did not claim or identify any copyrights in the trailer trash doll designs as his separate property. Had he done so, they would have been subject to claims by his creditors, as well as a claim for conversion of company assets by Arsenic & Apple Pie LLC.

11. Following the above, with no funds or assets in its possession, Arsenic & Apple Pie, LLC, declared to its members that their respective interests in the Company were of no value and proceeded to dissolution.

First Cause of Action – Conversion

12. Counter-Claimant Tull realleges and incorporates herein by this reference the allegations of paragraphs 1 through and including 11 as though fully set forth herein.

13. On or about July 2, 2004, Montwillo filed copyright registration for two different doll designs, described and numbered as follows: VAu000631337 – Trash talking Trixie; and VAu000631338.

14. On or about July 13, 2004, Montwillo filed copyright registration for three different doll designs, described and numbered as follows: VA0001271343 – Blonde drag queen doll; VA0001271341 – Redhead drag queen doll; and VA0001271342 – Trailer trash doll. True and

1 correct copies of the Copyright Office's records regarding these applications are attached hereto
2 as Exhibits A, B, C, D and E respectively, and are incorporated herein by this reference as
3 though fully set forth.

4 15. Counter-Claimant Tull is informed and believes, and thereon alleges, that all of these
5 copyright applications, pertain to designs created by Montwillo while he was a managing
6 member of the Arsenic and Apple Pie LLC, and as such are assets of that Company, and are
7 not, and have never been, the personal property of Montwillo. Montwillo did not seek the
8 consent of Tull before filing these applications, and in fact made these filings in secret.

9 16. The claim made in these applications is a fraud on the Copyright Office, and is a
10 conversion by Montwillo of Company assets which, following the dissolution of the Company,
11 were transferred to Tull in satisfaction of the substantial debt owed to him by the Company. The
12 applications were further fraudulent in that Montwillo failed to disclose the ownership claim of
13 the Company to said dolls.

14 17. The conversion of these assets, and the subsequent assertion of this meritless
15 complaint alleging copyright infringement, were intentional acts which have clouded the title to
16 these designs, and caused significant financial damage to Tull, in that these claims hamper his
17 ability to exploit these designs, and have caused him to be compelled to retain counsel, and
18 defend his ownership rights to these designs in three different legal forums since 2005, all to his
19 damage in an amount to be shown according to proof at trial.

20 18. Montwillo's intentional act in converting this property of Tull's, and in maintaining the
21 instant action for copyright infringement, are acts done for the purpose of extracting a settlement
22 payment from Tull, and have not been brought in good faith. Tull is therefore entitled to, and
23 seeks, an award of punitive damages against Montwillo in an amount sufficient to deter
24 Montwillo from taking such actions in the future.

Second Cause of Action – Breach of Contract

19. Counter-Claimant Tull realleges and incorporates herein by this reference the allegations of paragraphs 1 through and including 18 as though fully set forth herein.

20. The Operating Agreement of the Arsenic and Apple Pie LLC provides that all disputes between the members arising out of the operation of the business are to be resolved by binding arbitration before the American Arbitration Association. Counter-Defendant Montwillo has breached this term of the Agreement by filing a copyright infringement action with this Court and by refusing to arbitrate the claims made by Tull in this Counter Claim, for conversion, breach of contract and bad faith breach of the covenant of good faith and fair dealing.

21. Montwillo's refusal to allow this and the previous matters to be resolved through binding arbitration is a breach of the Operating Agreement between the parties, and has caused damage to Tull in the form of increased attorney fees and costs, in an amount to be shown according to proof at trial, together with his reasonable attorneys fees, as allowed pursuant to the terms of the Operating Agreement.

Third Cause of Action – Breach of the Covenant of Good Faith and Fair Dealing; Breach of Fiduciary Duty

22. Counter-Claimant Tull realleges and incorporates herein by this reference the allegations of paragraphs 1 through and including 21, as though fully set forth herein.

23. Parties entering into contracts in the State of California are bound by a covenant of good faith and fair dealing. Members of a Limited Liability Company owe their fellow members a fiduciary duty of loyalty.

24. In taking the actions aforesaid herein, Counter-Defendant Montwillo has repeatedly breached his duties of good faith and fair dealing, and his duty of loyalty to the LLC he was a member of. As a direct consequence of these breaches, Counter-Claimant Tull has been

1 damaged in an amount to be shown according to proof at trial. Montwillo's actions were
 2 intentional, and were taken in bad faith and for the purpose of compelling Tull to pay a
 3 settlement to him in order to be free of the effects of this conduct. Tull is therefore entitled to,
 4 and seeks, an award of punitive damages against Montwillo in an amount sufficient to deter
 5 Montwillo from taking such actions in the future.

7 WHEREFORE, Counter-Claimant Tull prays as follows:
 8

9
First Cause of Action

- 10 1. For damages arising from the conversion by Montwillo of Tull's property, specifically
 the copyright rights and related intellectual property rights in the doll designs, which
 were the subject of the unauthorized registration with the Copyright Office, in an
 amount to be shown according to proof at trial;
- 11 2. For punitive and exemplary damages in an amount sufficient to deter Montwillo from
 future actions of this nature;
- 12 3. For Tull's reasonable attorney's fees incurred in defending his copyright ownership;

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Second Cause of Action

- 14 4. For damages arising from Montwillo's breach of the LLC Operating Agreement by
 refusing to allow this matter to be resolved via binding arbitration in an amount to be
 shown according to proof at trial;
- 15 5. For Tull's reasonable attorney's fees incurred in prosecuting this breach of contract
 claim.

16
Third Cause of Action

- 17 6. For damages arising from Montwillo's repeated breaches of the covenant of good
 faith and fair dealing, and of his fiduciary duty of loyalty as a member of the LLC, in

1 an amount to be shown according to proof at trial;

2
3 7. For punitive and exemplary damages in an amount sufficient to deter Montwillo from
4 future actions of this nature;

5
6 **For All Causes of Action**

7 8. That the Court award Defendants their costs of suit; and
8 9. For such other and further relief as the Court deems just and proper.

9
10 DATED: January 10, 2008

11 
David Y. Wong, Attorney at Law

12 Attorneys for Defendants William Tull, Daniel
13 Gibby and Gibby Novelties, LLC